

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	MM Docket No. 92-195
)	
Amendment of Section 73.202(b),)	RM-7091
Table of Allotments,)	RM-7146
FM Broadcast Stations.)	RM-8123
(Beverly Hills, Chiefland, Holiday,)	RM-8124
Micanopy, and Sarasota, Florida))	
)	
In re Application of)	
)	
Heart of Citrus, Inc.)	File No. BPH-940307IZ
)	
For modification of the facilities)	
of Station WXOF(FM),)	
Beverly Hill, Florida)	

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MAY 10 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

TO: Douglas W. Webbink, Chief	Dennis Williams, Assistant Chief
Policy and Rules Division	Audio Services Division
Mass Media Bureau	Mass Media Bureau

PETITION FOR RECONSIDERATION

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May 10, 1996

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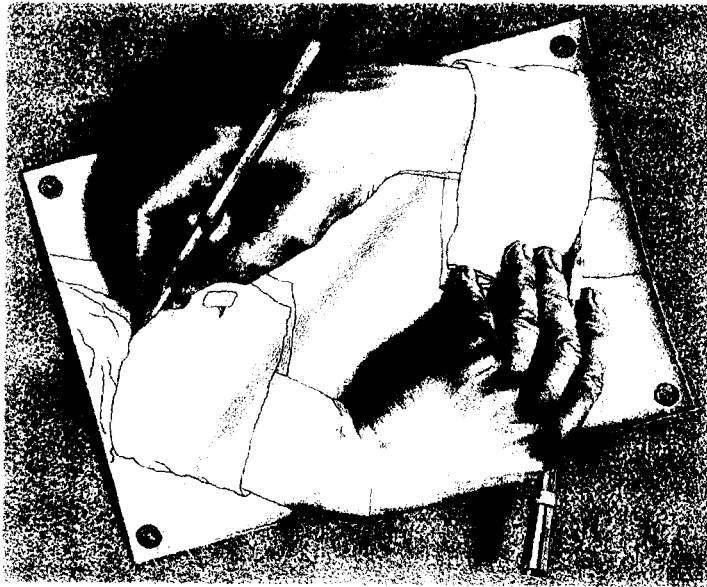
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Summary

The action of the Chief, Policy and Rules Division ("PRD"), dismissing the Application for Review filed in the above-captioned rulemaking proceeding by Dickerson Broadcasting, Inc. exceeded the PRD Chief's delegated authority, and must therefore be reconsidered and reversed.

Further, the "substantive" aspect of the PRD Chief's decision was based on a plainly invalid assumption concerning the level of "protection" which might, in the PRD Chief's view, be satisfactory to Dickerson. The PRD Chief's assumption in this regard was based on the grant, by the Assistant Chief, Audio Services Division, of the above-captioned application, which was filed pursuant to the allotment decision at issue in the above-captioned rulemaking proceeding. These actions are the regulatory equivalent of M.C. Escher's drawing, "Drawing Hands": the application which supposedly accords Dickerson protection and thus supposedly moots out his challenge to the rulemaking exists only because of the rulemaking, which is under challenge. Such circular bootstrapping does not constitute rational, non-arbitrary decisionmaking (particularly in light of the fact that a core substantive argument relied upon by Dickerson has, since the filing of Dickerson's Application for Review in January, 1994, been clearly and specifically affirmed by the PRD Chief), nor does it afford Dickerson due process in any meaningful sense.



Drawing Hands
by M.C. Escher

1. Pursuant to Section 1.106 of the Commission's Rules, Dickerson Broadcasting, Inc. ("Dickerson") hereby seeks reconsideration of the dismissal of Dickerson's Application for Review filed in MM Docket No. 92-195, captioned above. That action was set forth in a Memorandum Opinion and Order ("the *April, 1996 MO&O*"), DA 96-403, released April 16, 1996. A copy of that decision is included as Attachment A hereto. The *April, 1996 MO&O* was based on the action of the Mass Media Bureau granting an application (File No. BPH-940307IZ) of Heart of Citrus, Inc. ("Heart of Citrus"), modifying the facilities of Station WXOF(FM), Beverly Hills, Florida. The grant of the Heart of Citrus application was reflected in a public notice released on April 12, 1996. *Broadcast Actions*, Report No. 43715, Mimeo No. 62407, released April 12, 1996. A copy of the letter reflecting the grant of the application is also included in Attachment A hereto. As discussed below, both actions were contrary to well-established standards and should be reconsidered.

BACKGROUND

2. The history of Docket No. 92-195 is, unfortunately, tortuous, and the *April, 1996 MO&O*, also unfortunately, unnecessarily complicates that history further. This proceeding started nicely and simply: in 1989 -- some seven years ago -- Heart of Citrus sought to upgrade its operation on its then-authorized channel, moving from Class A status to Class C3 on Channel 246. The proposal was about as uncomplicated and non-controversial as they get. That proposal would not have affected Dickerson's operation of Station WEAG-FM, Starke, Florida (on Channel 292), in the least.

3. Three years later, however, a counter-proposal was filed in which it was suggested that Heart of Citrus' channel be modified to 292C3, co-channel to Dickerson's

station.^{1/} Nobody bothered to tell Dickerson about this proposal, even though the mileage separation between Beverly Hills and Station WEAG-FM was substantially less (by about four kilometers) than the required separations set forth in the rules effective at the time the counter-proposal was submitted. No mention of that counter-proposal was published by the Commission in the Federal Register.

4. By *Report and Order* ("the 1993 R&O"), 8 FCC Rcd 2197 (Chief, Allocations Branch 1993), the staff granted the counter-proposal, noting that the short-spacing could be addressed through reliance on Section 73.213(c)(1) of the Rules. See 8 FCC Rcd at 2198, n.6. The terse one-sentence treatment of that important question, relegated to a footnote, did not include any explanation of how the standards of Section 73.213, which were applicable only to petitions and applications filed prior to October 2, 1989^{2/}, could have properly been applicable to a counter-proposal filed more than three years *after* that deadline, a counter-proposal which fell far short of satisfying the mileage separations in effect at the time it was filed.

5. Dickerson, acting *pro se*, sought reconsideration of the 1993 R&O. In its petition Dickerson raised, *inter alia*, the lack of notice problem and the inapplicability of pre-

^{1/} The counter-proposal was advanced by parties who were hoping to improve their own situations in markets relatively distant from Beverly Hills and Starke. Those parties had already submitted essentially the same counter-proposal in another proceeding, and the Commission had already rejected that counter-proposal there.

While the counter-proposal would have benefited the counter-proponents, it would not have significantly advanced Heart of Citrus' interests. Indeed, the counter-proposal worked *against* Heart of Citrus' interests because, by unnecessarily complicating the matter, the counter-proposal resulted in substantial delay and uncertainty.

^{2/} See *Second Report and Order in Amendment of Part 73 of the Rules to Provide for an Additional FM Station Class (Class C3) and to Increase the Maximum Transmitting Power for Class A FM Stations* ("Mileage Separation Order"), 4 FCC Rcd 6375, 6382, ¶57 (1989).

October, 1989 technical standards to a proposal filed more than three years *after* the October 2, 1989 deadline. Dickerson's petition was, however, given the administrative back-of-the-hand in a *Memorandum Opinion and Order* ("the 1993 MO&O"), 8 FCC Rcd 8515 (Chief, Policy and Rules Division 1993), which denied Dickerson's petition, largely on procedural grounds.

6. Dickerson then filed a timely Application for Review pursuant to Section 1.115 of the Commission's Rules. In that Application for Review Dickerson set forth in considerable detail (with citation to equally considerable supporting authority) the multiple flaws in the decisions (*i.e.*, the 1993 R&O and the 1993 MO&O) of the Bureau's staff up to that point in the proceeding.

7. In filing an Application for Review, Dickerson understood that the full Commission would thus be presented the matter for its consideration. Such review by the full Commission is routine and is a statutory requirement to any appeal of agency action to the courts. *See* 47 U.S.C. §5(c)(7). Having given the Bureau's staff ample opportunity to recognize and correct the staff's own erroneous handling of this matter, Dickerson moved on to the full Commission (as Dickerson was specifically authorized to do by, *inter alia*, the Commission's own rules).

8. Imagine Dickerson's surprise when, almost two and one-half years after the filing of its Application for Review, out pops the *April, 1996 MO&O* reflecting the sudden dismissal of Dickerson's Application for Review *not* by the Commission, but by the Chief, Policy and Rules Division ("PRD")! Neither the PRD Chief nor his supervisor, the Chief of the Mass Media Bureau, has the authority to act on applications for review. *See* Section 0.283(b)(3).

9. Dickerson's surprise was doubled by the fact that the dismissal of the Application for Review was based on the Bureau's grant of an application filed by Heart of Citrus which (a) assumed the correctness of the contested allotment, and (b) then relied on Section 73.215 of the Commission's Rules to justify the grant, and then (c) relied on that grant to justify the dismissal of Dickerson's Application for Review.

10. In what passes for analysis in the *April, 1996 MO&O*, the PRD Chief cited the following language from Dickerson's Application for Review:

if Dickerson is assured the full measure of protection of the current mileage separations (as opposed to the mileage separations in effect prior to October 2, 1989), Dickerson will withdraw the instant application for review.

Dickerson Application for Review at 9, n. 3. Dickerson had made this commitment knowing that the mileage separations in effect would preclude a cochannel Class C3 allotment to Beverly Hills because the Beverly Hills allotment site was at least four kilometers short-spaced to Station WEAG-FM. Thus, absent an earthquake or other phenomenon which might move Beverly Hills and Starke four kilometers farther apart, Dickerson was relatively confident that the assurance referenced in the quoted footnote could not be given.^{3/}

11. And yet, in the *April, 1996 MO&O*, the staff proceeded to affirm the proposed short-spaced allotment of Channel 292C3 to Beverly Hills, relying on the following bizarre, circular, bootstrap reasoning:

^{3/} With further respect to the potential allotment of Channel 292C3 to Beverly Hills, Dickerson believed, and continues to believe, that no properly-spaced site exists which would permit the delivery of an adequate city-grade signal to Beverly Hills in compliance with the Commission's Rules. Full compliance with the city-grade coverage requirement is another *allotment* consideration which remains mandatory, notwithstanding the Commission's relaxation of standards relative to the processing of applications. See, e.g., *Modifications by Application*, *supra*, 8 FCC Rcd at 6, ¶6. This separate, fatal flaw -- i.e., lack of city-grade coverage -- is an additional block to the allotment of Channel 292C3 to Beverly Hills.

First, the staff assumed that the allotment of Channel 292C3 to Beverly Hills was proper. It made this assumption without apparent consideration of any of Dickerson's arguments.

Second, the staff accepted and considered Heart of Citrus' application specifying Channel 292C3, notwithstanding the non-final nature of the allotment.

Third, the staff concluded that Heart of Citrus' application was grantable as a result of the contour protection standards of Section 73.215, and the staff thus granted the application.

Fourth, having granted Heart of Citrus' application, the staff then incorrectly concluded that that application provided the protection referred to by Dickerson in its application for review.

In other words, in assessing the merits of Dickerson's challenge to the allotment decision, the staff assumed the correctness of that decision, acted on the basis of that erroneous assumption, and then claimed that Dickerson's challenge to that decision had effectively been mooted out by that subsequent action. While it may be convenient for the staff to attempt to dismiss challenges simply by assuming as a threshold matter that the challenger is wrong, such an approach is plainly unlawful.

ARGUMENT

12. Dickerson's arguments on reconsideration of the PRD Chief's *MO&O* are two-fold. First, the PRD Chief was without authority to act on Dickerson's Application for Review. Second, even if, *arguendo*, the PRD Chief did have the requisite authority, his decision is arbitrary and capricious, since it flies in the face of well-established Commission precedent and standards relative to channel allotment proceedings.

13. As a threshold matter, Dickerson notes here that it is hereby seeking reconsideration by the PRD Chief of his *MO&O* and by the Assistant Chief, Audio Services Division ("ASD"), of his decision to grant the Heart of Citrus application. Normally,

Dickerson would have filed an Application for Review of these actions. However, Section 1.115(c) requires that the subordinate authority be given an opportunity to consider and rule on all arguments in the first instance. Here, the subordinate authorities (*i.e.*, the PRD and the ASD) relied on two bases which were wholly unanticipated by Dickerson and, thus, not previously addressed in any of Dickerson's pleadings. Accordingly, in order to satisfy Section 1.115(c) of the Commission's Rules and to preserve its arguments for further administrative review, Dickerson is hereby presenting its arguments to the PRD Chief.^{4/}

THE PRD CHIEF LACKS AUTHORITY TO DISMISS A TIMELY APPLICATION FOR REVIEW.

14. As an initial matter, dismissal of Dickerson's Application for Review by the PRD Chief plainly exceeded the PRD Chief's delegated authority. *See* Section 0.283(b)(3) of the Commission's Rules. While a subordinate authority (*e.g.*, the PRD Chief) may prefer to avoid review of its decisions by a superior authority (*e.g.*, the Commission), the subordinate authority cannot do so simply by dismissing any properly filed requests for such review. Such an approach flies in the face of the basic organization of the Commission and basic procedures for orderly review within the agency.

15. Perhaps more importantly, such an approach suggests that at least the

^{4/} As set forth in a Statement for the Record being submitted to the Commission simultaneously herewith, Dickerson does not wish to waive in any respect consideration of the various arguments which Dickerson presented in its Application for Review but which were, by virtue of the PRD Chief's bizarre boot-strapping, not addressed (much less resolved) in the *April, 1996 MO&O*. Those arguments were, of course, already presented in a timely manner to the Commission for its consideration, and the Commission has not heretofore acted on them. As a result, Dickerson understands that those arguments are still pending, and will not be re-presented herein. To the extent necessary to assure the preservation of the arguments set out in Dickerson's Application for Review, Dickerson hereby incorporates them by reference. However, since the instant pleading is directed to the PRD Chief and the ASD Assistant Chief, and since the Application for Review is directed to the Commission, Dickerson does not anticipate that either of those subordinate authorities can, will or should attempt to address the arguments set out in the Application for Review.

subordinate authority (in this case, the PRD Chief) -- and possibly even the full Commission -- may be attempting to avoid effective judicial review of his decisions. As the Commission and its staff are well aware, presentation of arguments to (if not consideration and disposition by) the full Commission is normally a prerequisite to judicial review. By improperly short-stopping properly-filed applications for review and thus preventing the Commission from considering the arguments set out therein, the staff interferes with the judicial review process and effectively prevents parties (such as Dickerson) from obtaining such review in a timely manner. Accordingly, the staff should acknowledge the impropriety (and lack of authority) of its dismissal of Dickerson's Application for Review, and the staff should reinstate that Application for Review and refer it to the Commission for prompt consideration and disposition.

THE "SUBSTANTIVE" DISPOSITION OF THESE MATTERS BY THE PRD CHIEF AND THE ASD ASSISTANT CHIEF WAS ERRONEOUS.

16. Even if the PRD Chief were deemed, *arguendo*, to have the authority to dispose of Dickerson's Application for Review, the bases for the *April, 1996 MO&O*, and for the ASD Assistant Chief's grant of the Heart of Citrus application, are obviously flawed in any event.

17. Again, the *April, 1996 MO&O* dismisses Dickerson's Application for Review because, supposedly, Dickerson is "no longer aggrieved" by the channel allotment. That is because Dickerson has, supposedly, been accorded a level of protection which, the PRD Chief guesses, is satisfactory to Dickerson. Unfortunately, nothing could be further from the truth: the level of "protection" supposedly accorded to Dickerson is *not* satisfactory to Dickerson because, as it turns out, Dickerson has *not* been protected at all.

18. First and foremost, let us recall that this began as and remains an allotment proceeding in which the central question is whether Channel 292C3 can and should be allotted to Beverly Hills. The Commission has established, for allotment proceedings, certain minimum mileage separation standards. Under those standards, which have been in effect since October, 1989, Channel 292C3 at Beverly Hills must be at least 142 kilometers from Station WEAG-FM.^{5/} But the proposed Beverly Hills allotment is no more than 138 kilometers from WEAG-FM. Thus, that allotment falls well short of the current mileage separations.

19. The PRD Chief attempts to get around this fundamental problem by relying on facilities proposed by Heart of Citrus in an application which is, in turn, based on the assumption that the Channel 292C3 allotment is alive and well. In other words, skipping over the fact that the validity of the channel allotment is plainly subject to question, the staff (and Heart of Citrus) simply assume that the channel allotment is in place, and that Heart of Citrus may file an application for it. That assumption is obviously flawed coming out of the

^{5/} Dickerson recognizes that the PRD Chief has previously indicated in this proceeding, albeit without any justification or explanation, that Section 73.213(c) may be applicable to this case. But that is a point which Dickerson has specifically raised with the Commission in Dickerson's Application for Review. The PRD Chief cannot simply assume the correctness of his own view of things and rely on that assumption to short-circuit Dickerson's right to secure appropriate administrative and/or judicial review of the correctness of that assumption. This is especially so in view of the fact that, in November, 1995 (*i.e.*, since the filing of Dickerson's Application for Review), the PRD Chief himself explicitly and expressly demonstrated the correctness of Dickerson's position. In *Mount Pleasant, Iowa*, 10 FCC Rcd 12069 (PRD 1995), a petitioner proposed, prior to October 2, 1989, a co-channel upgrade from Class A to Class C3 (just as the original Beverly Hills proponent did here). A second party filed, after October 2, 1989, a counter-proposal suggesting that a different Class C3 channel be allotted (just as the Beverly Hills counter-proponents did here). But the counter-proposal failed to comply with the allotment spacing requirements in effect *after* October 2, 1989 (just like the Beverly Hills counter-proposal here). And sure enough, the counter-proposal in *Mount Pleasant, Iowa* was rejected because "*it failed to comply with the new rules.*" 10 FCC Rcd at 12070, ¶4. Thus, the PRD Chief demonstrated that Dickerson has been right all along.

box because the underlying allotment is under challenge.

20. But the PRD Chief then aggravates his own misguided approach by pointing out that the application which Heart of Citrus has filed (and which the ASD staff has granted) was itself short-spaced (*by almost 10 kilometers*, as it turns out) and was grantable only through use of the contour protection provisions of Section 73.215 of the Rules. And it is only because of that grant that the PRD Chief concludes that Dickerson is satisfactorily protected.

21. The problems with this approach are legion. Foremost among those problems is the fact that the Commission has made incredibly clear that Section 73.215's contour protection provisions are *NOT* to be used in the channel allotment process. *See, e.g.* Section 73.207; *Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application* ("*Modifications by Application*"), 8 FCC Rcd 4735, 4736, n. 7 ^{6/}; *John M. Salov*, 8 FCC Rcd 172, 174 (1993) ^{7/}. But that is precisely what the PRD

^{6/} In *Modifications by Application*, the full Commission stated that

[T]here are some types of showings that are considered acceptable in connection with applications, such as contour protection showings pursuant to Section 73.215 of the Rules . . . that we have expressly declined to consider in connection with allotment proceedings. ^{7/}

^{7/} In adopting rules allowing short spacing through the use of contour protection, we expressly declined to allow the use of contour protection at the allotment stage. . . .

^{7/} In *Salov*, the full Commission stated that

Section 73.215 was never intended to be used to permit short-spaced *allotments*. . . . We stated in adopting the directional antenna rules that, "[n]o change is made in the current FM channel allotment process, under which proposals for new channel allotments must meet minimum distance separations with respect to other co-channel stations and adjacent channel stations." *Directional Antennas*, 4 FCC Rcd at 1681.

(emphasis added).

Chief is doing here: the *April, 1996 MO&O* dismisses Dickerson's challenge to the staff's *allotment* decision on the basis of "protection" which is supposedly being afforded to Dickerson through Section 73.215 contour protection. In other words, the *allotment* of Channel 292C3 to Beverly Hills is being justified on the basis of supposed "protection" through Section 73.215.

22. Such an approach is plainly contrary to the rules established by the full Commission. *E.g., id.* Even if there were some basis for some waiver of those rules -- and no such basis has been presented to the Commission and Dickerson is aware of no such basis -- it is inappropriate and unlawful for a subordinate authority (such as the PRD Chief) to purport to waive those rules without some clear direction or approbation from the full Commission.

23. Further, as indicated above, the Heart of Citrus application is particularly flawed because it assumes as an essential threshold matter that Channel 292C3 can properly be allotted to Beverly Hills. But serious questions exist concerning precisely that matter, as demonstrated in Dickerson's Application for Review.

24. So that the record on this point is clear, Dickerson re-states its argument: the proposal to allot (remember, this is an *allotment* proceeding) Channel 292C3 to Beverly Hills was filed in late October, 1992, and was therefore subject to the mileage separation requirements then in effect for channel allotments; according to the mileage separation requirements then in effect for channel allotments, the Beverly Hills channel would have to be at least 142 kilometers from Station WEAG-FM in order to allottable there; Beverly Hills is only 138 kilometers (at most) from Station WEAG-FM; thus, Channel 292C3 cannot properly be allotted to Beverly Hills consistently with the Commission's well-establishment

allotment standards. Dickerson presented this argument to the Commission more than two years ago, and the Commission has yet to explain in what respect Dickerson's understanding of the rules is flawed. Indeed, as noted in Footnote 5, above, the PRD has independently confirmed the correctness of Dickerson's argument!

25. Finally, with respect to the PRD Chief's claim that his action provides some satisfactory measure of "protection", let us dispel that risible misconception here and now. The Commission's *channel allotment* rules assure, and have since October, 1989 assured, that channel allotment proposals and counter-proposals (*see Mount Pleasant, Iowa, supra*) advanced after October 2, 1989 would have to meet certain minimum mileage separation standards. Those standards reflect a level of "protection" guaranteed to existing stations as against new allotments. Dickerson is entitled to that level of protection.

26. Under the minimum mileage standards in effect since October, 1989, Dickerson is entitled not to have a co-channel Class C3 channel located less than 142 kilometers from Station WEAG-FM. But by the Commission's own admission, the Channel 292C3 Beverly Hills allotment fails to meet the mileage separation standards by at least four kilometers. Thus, it cannot accurately be said that Dickerson has been "protected" in any meaningful sense.

27. The notion that Dickerson has somehow been "protected" is even more laughable when the Heart of Citrus application is considered. In that application Heart of Citrus proposes a transmitter site which is *not* 142 kilometers distant from Station WEAG-FM. Nor does it propose a site which is even 138 kilometers distant. Rather, it proposes a site which is only 132.6 kilometers distant, approximately 10 kilometers short-spaced. This is "protection"? Dickerson does not believe so, and Dickerson specifically rejects the PRD

Chief's blithe and self-serving assumption in the *April, 1996 MO&O*, *i.e.*, that such "protection" is consistent with the language of Footnote 3 in Dickerson's Application for Review.

28. Finally, Dickerson notes that the entire exercise of the Beverly Hills proceeding may be pointless because, as a practical matter, it is likely that Channel 292C3 can never be used there for reasons separate and apart from the fatal flaws discussed above. As the Commission is aware, the utilization of Channel 292C3 in Beverly Hills is contingent upon the abandonment of Channel 292A by Station WDFL(FM), Cross City, Florida, pursuant to MM Docket No. 87-455. *See, e.g.*, 4 FCC Rcd 5599 (Allocations Branch 1989), *recon. denied*, 7 FCC Rcd 2557 (Policy and Rules Division 1992). The likelihood of any such abandonment in the near future is, as far as Dickerson can determine, relatively small, if not altogether non-existent. As it turns out, while Station WDFL(FM) has been granted a construction permit to change channels and relocate, its efforts to obtain local approval of the site specified in that permit have been rejected.^{8/} As a result, while Station WDFL(FM) may have a permit from the Commission, it is extremely unlikely that the facilities specified in that permit will ever actually be constructed. And unless and until that happens, Heart of Citrus will be precluded from actually effectuating its channel change, even if Dickerson's arguments concerning that change are completely ignored. In light of this additional, practical consideration, Dickerson submits that, in addition to being arbitrary, capricious, unlawful and lacking in due process, the Commission's headlong efforts to allot Channel 292C3 to Beverly Hills make no practical sense.

^{8/} Included as Attachment B hereto is a copy of a resolution of the County Commissioners of Gilchrist County reflecting denial of a petition for a special permit to authorize construction of the Station WDFL(FM) tower.

CONCLUSION

29. A famous drawing by M.C. Escher depicts two hands, each holding a pencil. Each hand appears to be drawing the other. It is a perfectly realistic representation of an apparently logical, but practically impossible, situation. Each hand does indeed appear to be drawing the other. But upon even minimal reflection, the viewer must recognize that, notwithstanding the "realistic" quality of the drawing, it depicts only an illusion.

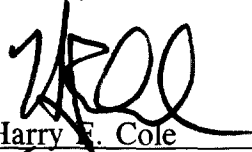
30. The *April, 1996 MO&O* brings that drawing to mind. The channel allotment proceeding is one of Escher's two hands. That proceeding creates a channel allotment (which Dickerson has challenged). The Heart of Citrus application is the second of Escher's hands. That application creates the supposed "protection" for Dickerson which, supposedly, validates the result in the allotment proceeding. In other words, each element -- the allotment proceeding and the application -- appears to be dependent on the other for its existence and validity, just as each of Escher's hands appears to be dependent on the other for its existence.

31. As with the Escher drawing, however, any appearance of legitimacy in the actions at issue here is purely illusory. The staff has concocted a clever *trompe l'oeil* designed to create the impression of rational decision-making consistent with due process. But, as Dickerson has previously demonstrated, and as it further demonstrates above, that impression is nothing but illusion. In fact, the decisions at issue here are plainly contrary to practice, procedure, precedent and due process. Accordingly, those decisions should be reconsidered and reversed.

WHEREFORE, for the reasons stated, Dickerson Broadcasting, Inc. submits that the actions taken with respect to the above-captioned matters should be reconsidered and

reversed, and Dickerson's Application for Review (filed January 7, 1994) should be reinstated and referred immediately to the Commission for its consideration.

Respectfully submitted,


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May 10, 1996

ATTACHMENT A

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-195

In the Matter of

Amendment of Section 73.202(b),	RM-7091
Table of Allotments,	RM-7146
FM Broadcast Stations.	RM-8123
(Beverly Hills, Chiefland, Holiday,	RM-8124
Micanopy, and Sarasota, Florida)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 21, 1996; Released: April 16, 1996

By the Chief, Policy and Rules Division:

1. The Commission has before it an Application for Review filed by Dickerson Broadcasting, Inc. ("Dickerson Broadcasting"), licensee of Station WEAG, Channel 292A, Starke, Florida, directed to the *Memorandum Opinion and Order* in this proceeding, denying its Petition for Reconsideration, 8 FCC Rcd 8515 (1993). Pasco Pinellas Broadcasting Company filed an Opposition to the Application for Review. Sarasota-FM, Inc., Gator Broadcasting Corporation, and Heart of Citrus, Inc. filed a Joint Opposition to the Application for Review. Dickerson Broadcasting filed a Consolidated Reply to the Oppositions. For the reasons discussed below, we dismiss the Application for Review.

Background

2. At the request of Heart of Citrus, Inc., permittee of Station WXOF, Channel 246A, Beverly Hills, Florida, the *Notice of Proposed Rule Making* in this proceeding, 7 FCC Rcd 5910 (1992), proposed the substitution of Channel 246C3 for Channel 246A at Beverly Hills, and modification of the Station WXOF construction permit to specify operation on Channel 246C3. In response to the *Notice*, Sarasota-FM, Inc., licensee of Station WSRZ, Channel 292A, Sarasota, Florida, and Gator Broadcasting Corporation, licensee of Station WRRX, Channel 249A, Micanopy, Florida, filed a joint counterproposal proposing an alternate Channel 292C3 upgrade for WXOF in Beverly Hills, in order to accommodate a Channel 246C2 upgrade for WLUV, Channel 292A, Holiday, Florida, and a Channel 300A substitution for Station WLQH, Channel 247A, Chiefland, Florida. In turn, these channel substitutions permitted a Channel 293C2 upgrade for Station WSRZ, Channel 292A, Sarasota, Florida, and a Channel 247C2 upgrade for Station WRRX, Channel 249A, Micanopy, Florida. The *Report and Order* upgraded Station WLUV in Holiday to Channel 246C2, Station WRRX in Micanopy to Channel 247C2, Station WSRZ in Sarasota to Channel 293C2, and Station WXOF in Beverly Hills to Channel 292C3, 8 FCC Rcd 2197 (1993).

3. The *Report and Order* and the subsequent *Memorandum Opinion and Order* both referred to the three-kilowatt operation of Station WEAG, Channel 292A, Starke, Florida. In the *Report and Order* in MM Docket No. 88-375 ("*Mileage Separation Order*"), 4 FCC Rcd 6375 (1989), the Commission adopted new separation requirements and provided for the six-kilowatt operation by Class A FM stations. Class A FM stations complying with the new separation requirements are now permitted to operate at six kilowatts. Station WEAG does not comply with the new separation requirements with respect to Station WCJX, Channel 293A, Five Points, Florida, and Station WPVJ, Channel 293A, Ponte Vedra, Florida. In the absence of an agreement among these stations, Station WEAG is, therefore, not eligible to operate at six kilowatts. In addition to establishing an October 2, 1989, effective date, the *Mileage Separation Order* set forth 142 kilometers as the minimum spacing between a Class C3 FM station and a Class A FM station seeking to operate at six kilowatts. The former minimum separation between a Class C3 station and a three-kilowatt Class A FM station was 138 kilometers. The *Mileage Separation Order* also stated that petitions for rule making filed prior to the effective date would be processed pursuant to the former separation requirements. Inasmuch as the Heart of Citrus Petition for Rule Making was filed on September 29, 1989, the applicable separation requirement specified a 138-kilometer separation between the proposed Class C3 allotment at Beverly Hills and Class A FM Station WEAG in Starke. Thus, Channel 292C3 was allotted to Beverly Hills on the basis of the 138-kilometer separation requirement.

4. In its Petition for Reconsideration directed against the *Report and Order*, Dickerson Broadcasting contended that a Channel 292C3 upgrade at Beverly Hills was made without notice and posed an impediment to its efforts to increase the operating power of Station WEAG to six kilowatts. Moreover, Dickerson Broadcasting also contended that there was no basis to apply the former spacing requirements with respect to a Channel 292C3 allotment at Beverly Hills. The *Memorandum Opinion and Order* rejected these arguments and denied the Petition for Reconsideration.

5. In its Application for Review, Dickerson Broadcasting again notes that a Channel 292C3 upgrade at Beverly Hills impedes its efforts to increase the operating power of Station WEAG to six kilowatts. In addition, Dickerson Broadcasting reiterates its view that Channel 292C3 was allotted without adequate notice and should not have been allotted on the basis of the former separation requirements. In regard to an impediment to a six kilowatt operation by station WEAG, Dickerson Broadcasting states in footnote 3 of its Application for Review as follows:

"Indeed, for the record, Dickerson hereby advises the Commission and all parties hereto that, if Dickerson is assured the full measure of protection of the current mileage separations (as opposed to the mileage separations in effect prior to October 2, 1989), Dickerson will withdraw the instant application for review."

6. On March 21, 1996, we granted the application of Heart of Citrus (File No. BPH-940307IZ) to implement the Channel 292C3 upgrade for Station WXOF at Beverly Hills. That application was filed pursuant to Section 73.215 of the Commission's Rules and expressly affords Station

WEAG protection as if it were a six kilowatt Class A FM station.¹ In view of the fact that the authorized facilities of Station WXOF now protect Station WEAG as a six-kilowatt facility in accordance with the current separation requirements set forth in Section 73.207 of the Rules, Dickerson Broadcasting is no longer aggrieved by our action in MM Docket No. 92-195 allotting Channel 292C3 to Beverly Hills. In light of this fact and the representation specifically set forth in footnote 3, we are dismissing the Application for Review.

7. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by Dickerson Broadcasting, Inc. IS DISMISSED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 776-1654

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

¹ Section 73.215 of the Rules provides for the acceptance of an FM application that proposes a short-spaced transmitter site if the application complies with specified contour protection criteria. See *Amendment of Part 73 of the Commission's Rules to*

Permit Short-Spaced FM Assignments by Using Directional Antennas, 4 FCC Rcd 1681 (1989), *recon. granted in part and denied in part*, 6 FCC Rcd 5356 (1991).

**FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

MAR 21 1996

IN REPLY REFER TO:
1800B3-RPC

Heart of Citrus, Inc.
Radio Station WXOF(FM)
P.O. Box 485
Crystal River, FL 32623

Re: WXOF(FM), Beverly Hills, FL
BPH-940307IZ

Dear Applicant:

The staff has under consideration the above-captioned minor change application filed by Heart of Citrus, Inc., ("HOC") proposing operation on Channel 292C3 pursuant to the *Report and Order* in MM Docket 92-195 and HOC's March 15, 1996 amendment.

Background On March 29, 1993, the Commission released the *Report and Order* in MM Docket 92-195 which modified HOC's license to specify operation on Channel 292C3 in lieu of Channel 246A.¹ On April 28, 1993, Dickerson Broadcasting, Inc., ("Dickerson"), licensee of WEAG(FM), Starke, Florida, filed a petition for reconsideration of the Commission's action taken in the *Report and Order* thus triggering the stay provisions of 47 C.F.R. § 1.420(f). On December 8, 1993, the Commission released a *Memorandum Opinion and Order* in MM Docket 92-195 which denied Dickerson's petition.² On January 7, 1994, Dickerson filed an application for review. On March 15, 1996, HOC filed an amendment requesting that the Commission conditionally grant its pending application subject to the outcome of MM Docket 92-195.

Discussion Our study reveals that HOC's application is in violation of the minimum distance separation requirements of § 73.207 with respect to WEAG(FM)'s licensed facilities. The required spacing is 142 kilometers. The actual spacing is 132.6 kilometers. HOC recognizes this short-spacing and requests processing pursuant to the contour protection provisions of § 73.215. Our study reveals that HOC's proposal is in compliance with all the requirements of § 73.215 with respect to WEAG(FM). Moreover, our study reveals that HOC's application is acceptable for filing in all other respects. The only impediment to grant of HOC's application that remains are the stay provisions of § 1.420(f).

¹ See *Report and Order* MM Docket 92-195, 8 FCC Rcd 2197 (1993).

² See *Memorandum Opinion and Order* MM Docket 92-195, 8 FCC Rcd 8518 (1993).

Grant of HOC's application will permit, herewith, resolution of the longstanding proceedings in MM Dockets 87-455 and 92-195. Accordingly, on our own motion and for administrative convenience, 47 C.F.R. § 1.420(f) IS HEREBY WAIVED and HOC's application IS HEREBY GRANTED with conditions. This action is taken pursuant to § 0.283. Authorizations will follow under separate cover.

Sincerely,

A handwritten signature in black ink that reads "Dennis Williams". The signature is written in a cursive, slightly stylized font.

Dennis Williams
Assistant Chief
Audio Services Division
Mass Media Bureau

cc: Gammon & Grange, P.C.
Stephan M. Kramer, P.E. and Associates
Leibowitz & Spencer
Bechtel & Cole
Pepper & Corazzini
Kaye, Scholer, Fierman, Hays & Handler
Rini & Coran
Fisher, Wayland, Cooper, Leader and Zaragoza L.L.P.
Levanthal Senter and Lerman
Reddy, Begley, Martin & McCormick
Allocations Branch

ATTACHMENT B

RESOLUTION NO. 96- 11

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF GILCHRIST COUNTY, FLORIDA, DENYING A SPECIAL PERMIT FOR ESSENTIAL SERVICES FOR A RADIO TOWER, AS AUTHORIZED UNDER SECTION 14.11 OF THE GILCHRIST COUNTY LAND DEVELOPMENT REGULATIONS.

WHEREAS, Ordinance 93-04, as amended, entitled Gilchrist County Land Development Regulations, hereinafter referred to as the "County's Land Development Regulations", empowers the Board of County Commissioners of Gilchrist County, Florida to approve special permits for essential services for radio, telecommunication, and television antennae or towers, owned or operated by publicly regulated entities;

WHEREAS, a petition for a special permit for a radio tower has been filed with the County by Women in Florida Broadcasting, Inc.;

WHEREAS, pursuant to the County's Land Development Regulations, the Board of County Commissioners held the required public hearing, with public notice having been provided on said petition for a special permit, as described below and considered all comments received during said public hearing;

WHEREAS, the Board of County Commissioners has found that they are required under Section 14.11 of the County's Land Development Regulations to approve a special permit for a radio tower owned or operated by a publicly regulated entity;

WHEREAS, Women in Florida Broadcasting, Inc., with regards to its radio tower, is regulated by a public entity;

WHEREAS, the Board of County Commissioners has determined and found that there has not been a showing of the need for such service in the requested location, nor that it is in the public interest that such special permit be granted.

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Gilchrist County, Florida that the petition of Women in Florida Broadcasting, Inc. for a special permit to construct a radio tower on the following described real property:

The East Half of the Southeast Quarter of the Southeast Quarter of Section 24, Township 10 South, Range 15 East, Gilchrist County, Florida, LESS AND EXCEPTING the property described as

Commence at the Southeast corner of Section 24, Township 10 South, Range 15 East, for and as the Point of Beginning. Thence run on the South line of said Section 24, South 89 degrees 04 minutes 33